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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1971

No. 71-22

HAROLD R. SWENSON, Warden,
Missouri State Penitentiary,
Petitioner,

vs.

JAMES WILLIAM STIDHAM,
Respondent.

RESPONSE NOT PRINTED

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Comes now the petitioner, Harold R. Swenson, Missouri State Penitentiary for Men at Jefferson City, Missouri, and through his Attorney of Record, seeks a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and would state and allege in the following particulars, to-wit:

OPINIONS BELOW

The Opinions of the Supreme Court of Missouri are cited as *State* v. *Stidham,* (Mo.Sup. 1957) 305 S.W.2d 7; *State* v. *Stidham,* (Mo.Sup. 1967) 415 S.W.2d 297; and *State* v. *Stidham,* (Mo.Sup. 1970) 449 S.W.2d 634, and are appended hereto as Appendixes A through C. That the Opinion of the United States District Court for the Western District of Missouri, not yet reported, is cited as *Stidham* v. *Swenson,* ..... F.Supp. ....., No. 18121-2, and is appended hereto as Appendix D. That the Opinion of the United States Court of Appeals for the Eighth Circuit, not yet reported, is cited as *Stidham* v. *Swenson,* ..... F.Supp. ....., No. 20685, and is appended hereto as Appendix E. A Motion for Rehearing or Transfer to the Eighth Circuit Court En Banc, which was denied by an equally divided Court on June 11, 1971, is appended hereto as Appendix F.

JURISDICTIONAL STATEMENT

That the petitioner filed a Petition for Writ of Habeas Corpus pursuant to Title 28, Section 2254, U.S.C.A., in the United States District Court for the Western District of Missouri, Western Division. That from the denial of the granting of the writ by that court, the respondent appealed to the United States Court of Appeals for the Eighth Circuit, which by its opinion filed on May 24, 1971, remanded the cause to the District Court for further proceedings consistent with the remedy provided for in *Sigler* v. *Parker,* 396 U.S. 482 (1970).

Jurisdiction is conferred upon this Court by the provisions of Section 1254, Title 28, U.S.C.A., in that this petition is sought within ninety (90) days from the filing of the opinion below and is, therefore, timely under the provisions of Section 2101, Title 28, U.S.C.A.

QUESTIONS PRESENTED

Did the Eighth Circuit Court of Appeals, sitting in *habeas*, correctly apply *Sims* v. *Georgia*, 385 U.S. 538, by holding that a finding that a confession was ". . . [N]ot involuntary as a matter of law . . ." did not comply with *Jackson* v. *Denno*, 378 U.S. 368?

Did the Eighth Circuit Court, sitting in *habeas*, correctly interpret Missouri procedure when it held that the Missouri procedure of 1955 as to the introduction of confessions in evidence before a jury did not comply with *Jackson* v. *Denno*, 378 U.S. 368?

Did the Eighth Circuit Court of Appeals, sitting in *habeas*, abuse its discretion by allowing a second appeal, on identical issues, from the denial of a petition for habeas corpus, after the petitioner had once voluntarily dismissed his appeal?

STATUTORY PROVISIONS INVOLVED

Title 28, U.S.C.A., Section 1291, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . ."

Title 28, U.S.C.A., Section 2253, provides:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> "There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant

to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

Title 28, U.S.C.A., Section 2254, provides:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of

competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

STATEMENT

Respondent is presently confined at the Missouri State Penitentiary at Jefferson City, Missouri, serving a life sentence for First Degree Murder. The procedural history of this case is as follows: On November 23, 1954, an indictment was returned by the Grand Jury and filed in the Circuit Court of Cole County charging defendant and six other penitentiary inmates with the First Degree murder of Walter Lee Donnell, another inmate at that institution, on or about September 22, 1954, during a riot at the Missouri State Penitentiary (Tr. 5, Cause No. 45537). On that same date, all of those accused including defendant were arraigned before the Court and counsel was appointed to represent each of them individually. On December 6, 1954, all of the accused entered pleas of not guilty (Tr. 7, 10-11, Cause No. 45537).

On December 14, 1954, defendant filed a Motion for Production and Inspection, a Motion to Dismiss, a Motion for a Severance, a Motion for a Polygraph Examination and a Motion to Suppress (Tr. 12-18, Cause No. 45537). On December 20, 1954, the Court sustained the Motion for a Severance (Tr. 18, Cause No. 45537), and denied the Motion to Dismiss (Tr. 19, Cause No. 45537) and the Motion to Suppress (Tr. 20, Cause No. 45537). On December 23, 1954, the Court denied the Motion for a Polygraph Examination and on January 3, 1955, the State confessed the Motion for Production and Inspection (Tr. 22, 24, Cause No. 45537). On February 15, 1955, defendant filed an application for change of venue and an affidavit in support thereof based upon the alleged bias and prejudice of Cole County citizens against him, and also filed an affidavit for disqualification of Judge Sam C. Blair based on alleged interest and prejudice (Tr. 27-44, Cause No. 45537). On February 16, 1955, Judge Blair sustained the application

for his disqualification and so notified the Supreme Court of Missouri (Tr. 45, Cause No. 45537). On February 22, 1955, on order of the Supreme Court of Missouri Judge George P. Adams was transferred to hear appellant's case and on February 25, 1955, Judge Adams sustained defendant's application for change of venue and transferred this cause to the Circuit Court of Butler County, Missouri (Tr. 45-49, Cause No. 45537).

On April 25, 1955, defendant waived formal arraignment, pleaded not guilty and the cause proceeded to trial before a jury. Upon learning that the jury had read a newspaper account of the trial, the Court granted defendant's request for a mistrial and the cause was reset for July 18, 1955 (Tr. 55-64, Cause No. 45537). On July 18, 1955, the trial commenced and continued until July 20, 1955, when the jury returned a verdict finding defendant guilty of murder in the first degree and assessing his punishment at life imprisonment (Tr. 757-760, Cause No. 45537).

The cause was appealed on the Transcript and the conviction was affirmed by the Supreme Court of Missouri on September 9, 1957, *State* v. *Stidham*, (Mo.Sup.) 305 S.W. 2d 7. On March 9, 1958, pursuant to Missouri Supreme Court Rule 27.26, V.A.M.R., the respondent filed *pro se* in the Circuit Court of Butler County a Motion to Vacate and set aside his sentence. The Motion to Vacate was denied without an evidentiary hearing and on appeal the Supreme Court of Missouri affirmed the order and judgment. *State* v. *Stidham*, (Mo.Sup.) 403 S.W.2d 616.

Thereafter, respondent filed a *pro se* Motion to Vacate and Set Aside his sentence pursuant to Supreme Court Rule 27.26, V.A.M.R., which presented claims allegedly not presented in the first motion. The trial court without an evidentiary hearing also denied the second motion to vacate and on appeal, the Supreme Court of Missouri re-

versed the order and judgment and remanded the cause for further proceedings in compliance with the amended provisions of Rule 27.26. *State* v. *Stidham,* (Mo.Sup.) 415 S.W.2d 297. Appellant filed a change of venue, and filed his motion in the Circuit Court for the City of St. Louis, and an evidentiary hearing was had December 5, 1968.

At the evidentiary hearing the original transcript and a stipulation of facts were offered and received in evidence and appellant and the State introduced other evidence pertaining to the issues made by the pleadings. On April 14, 1969, appellant's motion to set aside judgment and sentence was overruled (Tr. 130, Cause No. 54674). A consolidated appeal, both reinstated direct appeal and appeal from respondent's 27.26 hearing, was made to the Supreme Court of Missouri and that Court affirmed the decision of the lower court. *State* v. *Stidham,* (Mo.Sup.) 449 S.W.2d 634.

On February 18, 1970, respondent filed petition for *habeas corpus* in the United States District Court for the Western District of Missouri, Western Division which was denied by that Court by order entered on May 15, 1970. [*Stidham* v. *Swenson,* ..... F.Supp. ....., No. 18121-2]. From this denial respondent filed a Notice of Appeal and a request for Certificate of Probable Cause which was granted. On June 25, 1970, the United States Court of Appeals for the Eighth Circuit granted respondent's Motion to Dismiss his appeal and on October 14, 1970, denied respondent's Motion to Reinstate his appeal on the Eighth Circuit docket. On September 25, 1970, appellant filed a second petition for *habeas corpus* in the United States District Court for the Western District of Missouri which by reference he stated identical grounds as his prior petition. The United States District Court for the Western District of Missouri likewise denied this petition for writ of *habeas*

corpus, and an appeal was taken to the United States Court of Appeal for the Eighth Circuit. That Court, on the 24th day of May, 1971, reversed and remanded to the District Court for further proceedings provided for in *Sigler* v. *Parker,* 396 U.S. 482 (1970), requiring a further evidentiary hearing before the Missouri courts.

The historical factual evidence presented before the Missouri Circuit Court in 1955 was as follows: Sgt. E. V. Nash of the Missouri Highway Patrol was the State's first witness and set the physical scene by identifying Exhibit 1 as a drawing he made showing the physical makeup of B-Basement of the Missouri State Penitentiary on September 22 and 23, 1954 and in describing that building and the contents thereof (Tr. 57-64), this witness also identified Exhibits 2, 3, and 7 as photographs showing gates, passageways and cells in and around the maximum punishment area of that institution.

Lt. W. S. Barton of the Missouri State Highway Patrol testified that at 10:00 p.m. on September 22, 1954, he arrived at the Missouri State Penitentiary and went to B-Basement, where he found the severely mutilated body of a man in Cell-18 of the maximum punishment area (Tr. 91-92). Lt. Barton identified Exhibit 8 as a photograph of a man whose body he found and it was introduced into evidence (Tr. 93-94). Lt. Barton further identified Exhibit 9, a sixteen pound sledge hammer, as the instrument he found beside the body on the night in question and further identified Exhibit 10 as a photograph of Cell-18 of the maximum punishment area (Tr. 95-98). This witness testified that when he found the sledge hammer it was bloody, and that all three (3) doors leading into the maximum punishment area of the Missouri State Penitentiary were standing open with water on the floor and debris scattered about (Tr. 108).

Sgt. James Rhodes, a Laboratory Chemist for the Missouri State Highway Patrol, testified that he analyzed stains on Exhibit 9, the sledge hammer, and that they were human blood (Tr. 128-130).

J. G. Lamar, Superintendent of Records at the Missouri State Penitentiary, testified that he had control and supervision of all records at that institution and that by law those records had to contain a photograph of and fingerprints of all inmates. He identified Exhibit 8 as a photograph of Walter Lee Donnell, an inmate at the Missouri State Penitentiary, and stated that on September 22, 1954, he viewed Donnell's dead body (Tr. 135-136), and further testified that he viewed that dead body while Dr. Shull performed an autopsy on it (Tr. 142-144).

James Enyard, an employee of Dulle Funeral Home in Jefferson City, Missouri, testified that on September 24, 1954, he saw the dead body of the person shown in Exhibit 8, the photograph of Donnell, and that he removed the body to the funeral home and embalmed it (Tr. 152-155). On the back of that body Mr. Enyard noted on the left side and in the rib section four (4) or five (5) wounds and also found five (5) round wounds on the left chest over the heart (Tr. 155-156). In his opinion the back wounds were made with a knife and front wounds with a round instrument (Tr. 157).

Dr. G. D. Shull testified that in Nashville, Tennessee, on September 25, 1954, he performed an autopsy on the body of Walter Lee Donnell, and this witness described numerous fractures, punctures, and wounds, and said that it was his medical opinion that the skull fracture was a mortal wound (Tr. 163-168). This witness testified that two (2) of the five (5) chest stab wounds went clear through the heart, while two (2) of the back wounds had

penetrated the heart. The chest wounds were mortal while the latter in all probability would be so considered (Tr. 169-170). Dr. Shull further testified that it was his opinion that the back wounds were caused by a thin blade, like that of a pocket knife, but did not penetrate as deep as the front wounds, which were caused by an instrument at least four (4) to five (5) inches long (Tr. 171-172). This witness testified that there were no gunshot wounds in the body (Tr. 172). The doctor testified that he thought the blunt end of Exhibit 9, the sledge hammer, could have caused the injury to the skull of Donnell (Tr. 174).

Clarence Dietzel, a member of the guard force at the Missouri State Penitentiary was on duty at the Missouri State Penitentiary on the night of the riot, and testified that he was on duty in B-Basement and that on that night there were nine (9) inmates in the maximum punishment area, including defendant Stidham (Tr. 187-188). A disturbance started in the prison around 6:30 p.m. that night and a group of rioters thereafter tried to break into B-Basement (Tr. 189). In that group this witness recognized Donald DeLapp, Paul Kenton, Jackie Lee Noble, William Hoover, and Joseph M. Vidauri, and he further heard DeLapp yell to Stidham and tell Stidham that they were coming to get him out and also heard Stidham yell back for them to hurry (Tr. 190-192). Mr. Dietzel testified that the group outside of B-Basement were using a sledge hammer similar to Exhibit 9 (Tr. 203), and an iron bar beating on the doors attempting to gain entrance to B-Basement. DeLapp demanded witness Dietzel's keys, which demand was refused (Tr. 198-199), but eventually the group of inmates broke in Gate No. 2 where the witness was and then they searched him and again demanded the keys to Gate No. 3, which demand was also refused (Tr. 204-205). The group thereafter got through Gate No. 3 and into Death Row, and Noble and others in the group

locked witness Dietzel in a cell in the maximum punishment area for approximately twenty (20) or twenty-five (25) minutes and then took him out of that area and thereafter he did not witness any of the events of the killing (Tr. 207-210).

The State then called James Creighton, an inmate, and defendant objected to his testimony, the basis being that the witness was claimed to be of unsound mind and defendant requested a hearing to determine his competency which was granted (Tr. 241). At this inquiry, held outside of the hearing of the jury, Mrs. Alma Miller, a medical records clerk at State Hospital No. 1, in Fulton, Missouri, testified that she was the custodian of the records of the patients in that hospital (Tr. 242). In conference it developed that only three (3) pages of the record, marked for identification as Exhibits C, C-1, and D were involved (Tr. 246-249), and the witness stated that she did not know who prepared those pages, did not see them prepared, did not know when they were prepared, except that an inmate of the Fulton Hospital typed them, and could not say that they were correct (Tr. 250-252, 256-258). For the purposes of the *voir dire* hearing only the Court admitted Exhibits C, C-1, D, 14 and 15 into evidence and they were incorporated into the Transcript (Tr. 260-267).

Still outside the hearing of the jury, James Creighton took the witness stand and testified in detail concerning his status as an inmate of the Missouri State Penitentiary, his convictions and the legal proceedings thereon, and his being in a cell in the maximum punishment area on the night in question (Tr. 267-270). He admitted being in Fulton State Hospital No. 1, Fulton, Missouri for thirty-five (35) days, admitted a cutting while in the Penitentiary, admitted that he had feigned an attempted suicide to get out of solitary at the prison and transferred to Fulton,

but denied being in any other mental institution, denied being taken before a Probate Court or being committed as an insane person (Tr. 270-273). At the close of this hearing, defendant's request to have witness Creighton declared incompetent was refused.

Before the jury witness Creighton testified that he was serving a life sentence in the Missouri State Penitentiary and on the night of September 22, 1954, was in Cell 17 in the maximum punishment area, next to Walter Lee Donnell in Cell 18 (Tr. 278-279). In June, 1954, defendant began celling in the maximum punishment area and from then until the night of the riot defendant cursed, ridiculed and threatened Donnell over and over and told Donnell that he would kill him if he could get at him (Tr. 280-285). On the night of the riot DeLapp and defendant Stidham hollered back and forth to each other, DeLapp saying that he was going to get defendant out of his cell and defendant begging DeLapp to hurry, during which time defendant was continuing to threaten to kill the witness and Donnell (Tr. 288-290). Defendant Stidham told Donnell that Donnell was to be killed because he had testified against "Thompson and them in St. Louis before the grand jury" (Tr. 291). Later defendant Stidham got out of his cell and together with Hoover, DeLapp, Kenton, Noble, Laster and Vidauri tried to get into the witness's cell, after clearing the other inmates out of the maximum punishment area (Tr. 292-293). This group had a key for the lock to witness's cell and were using a pole to keep witness back from the front door of the cell and a sledge hammer like Exhibit 9 did not pound the screens such as is shown on Exhibit 10, the photograph of the cell. During all of this the witness received a broken jaw but by jamming the lock to the cell with concrete, a comb and "junk" he kept them from getting in (Tr. 294-296). He heard defendant

Stidham tell Donnell they would get him next (Tr. 297) and then the group moved to Donnell's cell where the sledge was again used (Tr. 295).

From his cell witness could not see a person enter Donnell's cell but he could see a man go right up to the cell, all seven (7) of the men, including defendant Stidham, headed for Donnell's cell and went out of witness's sight, whereupon witness heard Donnell begging, hollering and pleading for his life, witness then heard a gurgling sound and saw the seven (7) men run out of the cell but thereafter he did not see any of them during that night (Tr. 297-299).

Herman Trout, an inmate of the Missouri State Penitentiary and a plumber of that institution, testified that on the night in question he went into his shop in B-Basement after the riot started (Tr. 335-337) and hid his tools from the riotors and watched while DeLapp, Hoover and Kenton tried to force open a door and heard DeLapp talk with defendant Stidham about getting Stidham out of his cell (Tr. 338-340). At DeLapp's direction a fire was started and later Vidauri and Noble joined them and knives were produced (Tr. 341-342). Witness Trout testified that the group eventually got the three (3) doors leading into the maximum punishment area open and defendant Stidham and Laster were let out of their cells, whereupon witness saw DeLapp put his arm around defendant and say "Gentlemen, I have brought you this far, this is your leader from here on." (Tr. 344-346). Defendant Stidham and others then got weapons, took Guard Dietzel out of that area and after getting the other inmates cleared out, went down into the cage of cells in the maximum punishment area proper (Tr. 347-351). Witness Trout heard hollering and yelling, and after the hollering stopped defendant Stidham and others emerged from death row and washed

their hands in a wash basin and discarded some of their clothing (Tr. 352). From his position witness could see the actions of the seven (7) men until they got into the maximum punishment area proper, and during the time the seven (7) were in there he heard a man screaming and yelling in a shrill voice stating that he was not a snitch (Tr. 353-354). While the seven (7) were getting into the maximum punishment area and while they were there, including the time that they washed and left the area, witness was in the dark in a position where the group could not see him (Tr. 384, 388). Witness testified that he did not see who murdered Walter Lee Donnell (Tr. 389).

Sgt. Percy Little, a State Highway Patrolman, testified that on September 27, 1954, he and another Patrolman and four (4) City of St. Louis policemen questioned defendant in the Athletic Building of the State Penitentiary, and defendant at that time wrote out a statement, identified as Exhibits 16 and 16-1, and then signed it (Tr. 394-396). At this stage the Court granted defendant's request for a preliminary hearing inquiring into the voluntariness of the oral and written statements made by defendant (Tr. 398). At this hearing, which covers pages 400-485 of the Transcript, the State presented the testimony of all the police officers and patrolmen who were present at the time of the questioning of defendant and who heard this oral confession and saw him sign Exhibit 16 and Exhibit 16-1. Each testified that no physical force or threats were used against defendant and that defendant voluntarily and of his own free will signed the confession admitting that he and others went into Donnell's cell and cut and beat Donnell and that he himself had used a kitchen knife six (6) to seven (7) inches in length to slash Donnell's face and neck. Each of the officers identified his signature on Exhibit 16-1 and his initials on Exhibit

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16, the latter being the first page of the written statement and the former the second page thereof. None of the officers saw a rope in the questioning room and none saw anyone abuse defendant in any way. Defendant Stidham himself testified on this preliminary hearing and said that on being questioned in the Athletic shed on September 27, 1954 he had first denied any knowledge of the death of Donnell (Tr. 474). At this time defendant Stidham said that he was held on a stool by handcuffs and a belt attached to the legs thereof and that a coat was placed on him and his hands were cuffed behind him (Tr. 452). When he told his interrogators that he would be willing to submit to a lie detector test, Lt. Eitzman told him that he would be given that test immediately, and he was thereupon raised off the floor by a rope attached to the handcuffs on his wrists. The first chaining up lasted fifteen (15) minutes, according to defendant Stidham's testimony, and he still refused to sign a statement, so he was raised up again and left hanging for thirty-five (35) more minutes, during which time he lost consciousness twice and was beaten. Defendant Stidham testified that he suffered an injury to his left arm rendering the hand thereof paralyzed in places (Tr. 453-455), and defendant further testified that because of the torture and pain he agreed to write out Exhibits 16 and 16-1, which he said were dictated to him by Sgt. Little (Tr. 455). At the close of this testimony the Court made the following ruling:

> "THE COURT: 16 and 16-1, it is the Court's opinion that the matters concerning the statement should be offered in the presence of the jury, subject of course to any attacks as to its credibility by the defendant. The defendant has of course the right to proceed to challenge the voluntariness of the statement and confession, even before the jury, but it is the Court's opinion that upon the evidence that has been offered before the Court that outside of the hear-

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ing of the jury, that the statement is and should be admissible in evidence, subject to further examination of witnesses which might be conducted, so we may proceed with Sgt. Little, as to his identification before the jury of the statement in question, Exhibits 16 and 16-1.

"MR. HENNELLY: In other words, the Court is overruling my motion, and request of the Court to hold as a matter of law, that these statements were involuntary, is that right?

"THE COURT: That is right. Mr. Sheriff will you bring the jury back in? [Tr. 486]."

Six police officers then testified before the jury and each identified Exhibits 16 and 16-1 as defendant's written statement and testified that it was voluntarily given (Tr. 486-565). Over defendant's objection the exhibits were then introduced into evidence and read to the jury (Tr. 569-571). After reading the confession of defendant Stidham, the State rested its case and the Court denied defendant's motion for judgment of acquittal of Murder in the First Degree and his motion for a reduction of the charge (Tr. 572-573). Defendant Stidham's first witness was Clyde Bridger, State Registrar of Vital Statistics, who identified Exhibit FF as a photostat of the Official Certificate of Death of Walter Lee Donnell, as amended, and also identified Exhibit G as a photostat of that certificate before its amendment (Tr. 574-580). The witness testified that Exhibit G showed the cause of death as being a bullet wound by gun and that Exhibit FF showed the cause of death as by injuries multiple, exchanged stab wounds in heart and lung, brain trauma and crushing injury of skull (Tr. 581-582), the witness testified that the amendment was made because of an affidavit furnished by the Cole County Sheriff, he being the one who signed the original Certificate of Death (Tr. 582-583). Defendant Stidham then testi-

fied that on the night in question he was in a cell in the maximum punishment area of the Missouri State Penitentiary next to the shower, somewhere West of Creighton's cell, and that at about 6:30 p.m. he heard the riot commence (Tr. 592-593). Stidham denied threatening Donnell or Creighton at any time but recalled that Creighton had often threatened to kill him and others in the maximum punishment area (Tr. 593-594). An unknown inmate let him out of his cell and he then went upstairs to B-Hall where he listened to the radio and drank coffee with other inmates (Tr. 596-597). He denied killing Donnell and denied ever being in the cell of Donnell on the night in question, stating that: "I am a thief, but I am not a murderer" (Tr. 597). Stidham testified he was questioned repeatedly about the murder by police officers and denied any implication at all times (Tr. 597-600). He then repeated his version of the giving of his oral and written statement in the Athletic shed at the Missouri State Penitentiary and stated that those statements were given because of the pain he was suffering and his inability to resist the torture applied (Tr. 600-604). He further denied being with DeLapp, Laster and Hoover at any time on the night in question (Tr. 621) and further testified that the rope which was used to string him up in the shed was tied through a web partition and then to the ceiling of the shed (Tr. 624, 626).

The jury found defendant Stidham guilty of murder in the first degree and his punishment was assessed at confinement in the Missouri State Penitentiary during the rest of his natural life.

ARGUMENT

The Eighth Circuit Court Below, Sitting in Habeas, Incorrectly Applied Sims v. Georgia, 385 U.S. 538, by Holding That the Finding by the Circuit Court of Butler County, Missouri, That a Confession Was Not Involuntary As a Matter of Law Did Not Comply with Jackson v. Denno, 378 U.S. 368.

This case involves the correct application by the Circuit Court of Appeals for the Eighth Circuit of this Court's Opinion in *Sims* v. *Georgia,* 385 U.S. 538, and necessarily includes a determination to be made as to the correct procedures in finding a confession voluntary pursuant to *Jackson* v. *Denno,* 378 U.S. 368. By reference to the opinion of the Eighth Circuit, attached hereto as Appendix E, it can be seen that that Court remanded for a hearing consistent with *Sigler* v. *Parker,* 396 U.S. 482, to the United States District Court for the Western District of Missouri, which had denied respondent's petition for writ of *habeas corpus* without an evidentiary hearing. The stated basis on which this case was remanded by the Eighth Circuit is set out at pages 3-4, and 6 of its opinion as follows:

> "We believe that the district court's analysis is incorrect. It assumes that Missouri law, at the time of Stidham's trial, required the trial court to find that a confession was voluntary before permitting it to be considered by a jury. Our examination of the Missouri case law convinces us that a trial court had and frequently used the right to submit the question of voluntariness to the jury without a prior determination that the confession was voluntary." . . . In its most recent *Stidham* opinion, 449 S.W.2d 634 (1970), the Missouri Supreme Court examined its procedure and determined that ". . . Missouri employed the so called Massachusetts procedure 'impliedly approved in Jackson v. Denno. . . .' In doing so, the court relied upon State v. Washington, 399 S.W.2d 109 (1966). We

point out that *State* v. *Washington* was decided after *Jackson* became the law, and a comparison of its standard with those enunicated in the Missouri cases, above cited reveals the difference between the 1955 and 1966 standards."

With this basis then the Court cavalierly concluded that the Circuit Court of Butler County, Missouri, submitted the voluntariness issue to the jury without making a prior *factual* determination that the confession was voluntary.

In this regard, the court stated at page 5 of its Opinion:

"Our analysis of the record of Stidham's trial leads us to conclude that the trial judge in this case submitted the voluntariness issue to the jury without making a prior factual determination that the confession was voluntary. His finding, that the confession was not 'involuntary as a matter of law,' was not, under the then existing Missouri law, the same as finding that it was voluntary."

Petitioner would note that this court was unable to draw this same conclusion in its Appendix to *Jackson* v. *Denno*. See Footnote 9 to Court's Opinion at 378 U.S. 380; and Appendix to the Opinion of the Court at 378 U.S. 397. These references indicate that it was unclear from appellate court opinions as to whether the Massachusetts or New York procedure was used by the trial court in determining the voluntariness of confessions.

In essence, then, the Eighth Circuit has found that the Missouri procedure prior to *Jackson* v. *Denno*, was the same as that procedure used by New York struck down in *Jackson*. This was done irrespective of the fact that the Missouri Supreme Court had, in *State* v. *Washington*, (Mo. Sup. 1966) 399 S.W.2d 109, held that the pre-*Jackson* cases in Missouri were indistinguishable in legal effect from the

Massachusetts rule approved. In that case, the court stated:

> ". . . The Missouri practice does not run afoul of the rules laid down in those cases for the determination of a voluntariness of a confession. In Jackson v. Denno, 378 U.S. 368, Footnote 7 at page 377, 84 S.Ct. 1774, at page 1781, 12 L.Ed.2d 908, states that: 'Under the New York rule the judge is not required to exclude the jury while he hears evidence as to voluntariness and perhaps is not allowed to do so.' The New York practice was condemned in Jackson v. Denno. It seems the practice of the State of Washington was quite similar to the New York rule. The Missouri practice is indistinguishable in legal effect from the Massachusetts rule as described and impliedly approved in Jackson v. Denno. See also Commonwealth v. Marshall, 338 Mass. 460, 461-462, 155 N.E.2d 798, 800. The Missouri practice contemplates a preliminary or voir dire examination to determine the competency of a confession before it is presented to the jury. This is a full hearing on the voluntariness of a confession out of the presence of the jury and a finding by the court that the confession was voluntary before it is admitted in evidence. State v. Howard, Mo., 383 S.W.2d 701, 702[1]. Thereafter, the witnesses to the circumstances under which the confession was made testify before the jury. The jury then determines the probative value of the confession under the instructions of the court which direct the jury to disregard it entirely if the jury finds the confession was not voluntarily made. State v. Deyo, Mo., 387 S.W.2d 561, 564, 565 [5, 6]; State v. Howard, Mo., 383 S.W.2d 701, 702 [1]." *Id.* at 114.

Petitioner would submit that as Circuit Judge Gibson said in dissent, at page 9, the Supreme Court of Missouri is the best interpreter of its own cases.

To reach its conclusion that a Missouri trial court *"could and frequently did"* submit the question of volun-

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tariness to a jury without prior determination of voluntariness by the court, the Eighth Circuit quoted from *State* v. *Gibilterra,* 116 S.W.2d 88, 94, at page 4 of its Opinion. Taken in context, the quote should read as follows:

> "It is not the law that if there be any substantial evidence indicating the confession was voluntary the court *must* refer the question to the jury, however much it may be outweighed by evidence to the contrary. If that were true the court would be doing no more than it always does throughout a trial in ruling on the admissibility of evidence; and there would be no need of such preliminary hearings except in the rare instances when such evidence is wholly lacking. On the other hand, when there is substantial conflicting evidence and the question is close it is better to refer the underlying issue of voluntariness to the jury than to exclude the confession, since there is less chance of a miscarriage of justice by leaving the question open to a second determination, before the jury on a rehearing of the evidence under proper instructions, than by foreclosing the inquiry. . . ." [Emphasis in original.] *Id.* at 93-94.

Similarly, the Eighth Circuit's reliance on *State* v. *Sanford,* 193 S.W.2d 37 (1946) is misplaced. *Sanford* was a concurring opinion by Judge Hyde of the Missouri Supreme Court, in a trilogy of cases cited as *State* v. *Ellis,* 193 S.W.2d 31, *State* v. *Sanford,* 193 S.W.2d 35, and *State* v. *Ellis,* 193 S.W.2d 37. The majority opinion for the Supreme Court of Missouri, sitting en banc, in this trilogy of cases was written by Judge Douglass and was a case concerning the applicability of *Lyons* v. *State of Oklahoma,* 322 U.S. 596; and *Ashcraft* v. *Tennessee,* 322 U.S. 143, it being defendant's position in that case that his confessions were involuntary as a matter of law and, thus, should not have been admitted into evidence by the trial court in that he was not taken before a committing magistrate having juris-

diction over the crime. Factually, then, the Eighth Circuit's reliance on *State* v. *Sanford* is inappropriate.

Likewise the reference in *State* v. *Laster*, 293 S.W.2d 300, relied upon by the Eighth Circuit factually differs from the case under instant consideration. In that case, when the State had indicated that the confession of Defendant Laster would be offered, a co-defendant with Respondent Stidham, the court conducted a hearing outside of the presence of the jury, at which Defendant Laster offered no testimony. The Supreme Court of Missouri then stated:

> "Since the defendant chose not to introduce any evidence at the preliminary hearing, and the state made a prima facie case on the voluntary nature of the confession, the court necessarily ruled it admissible. State v. Gibilterra, 342 Mo. 577, 116 S.W.2d 88, 93. In some instances our courts have considered also the evidence adduced before the jury in making a final ruling on the admissibility of a confession. State v. Gibilterra, supra; State v. Ramsey, 355 Mo. 720, 197 S.W.2d 949, 954. Here there was no motion to strike the confession at the conclusion of all the evidence. We rule the confession admissible, however, on the broader ground that on all the evidence there was no showing sufficiently strong to convince the court conclusively, or as a matter of law, that the confession was involuntary. . . ." *Id.* at 303-304.

Petitioner does not contend that the Missouri procedure prior to *Jackson* v. *Denno, supra*, strictly followed either the Wigmore rule, nor the Massachusetts rule. Petitioner does contend, however, that Missouri practice has consistently contemplated a preliminary or voir dire examination to determine the competency of a confession before it may be presented to a jury. That Missouri practice has consistently contemplated that the hearing is to be outside the presence of the jury, and that all evidence

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dealing with the voluntariness of the confession is to be presented for the court. Additionally, Missouri practice has consistently contemplated that the State carries the burden of proving voluntariness and that before a jury may consider a confession, the judge must find that the confession is not involuntary as a matter of law. Thus, petitioner would submit that the Eighth Circuit Court of Appeals has incorrectly interpreted *Jackson* v. *Denno.*

Irrespective, however, of what Missouri law may or may not have been as to the voluntariness of confessions in 1955, petitioner would submit that on the historical record presented herein, that the Circuit Court of Butler County, Missouri, did make a determination concerning the voluntariness of Respondent Stidham's confession and that that determination complied with *Jackson* v. *Denno.* Counsel for Respondent Stidham requested that a hearing be held outside the presence of the jury. Such a hearing was had, covering pages 400 through 485 of the transcript, Cause No. 45537. By motion, defense counsel requested:

> ". . . The court to conduct a preliminary examination and ask the court to inquire into the voluntariness of the statement, and to determine whether the statement was given voluntarily . . . and we ask that the hearing be conducted outside the hearing of the jury."

At the end of this voir dire hearing, and after hearing the testimony of two Missouri State Highway Patrolmen, and four City of St. Louis Policemen, the court ruled as follows:

> "The Court: Now, at the conclusion of the hearing held outside of the hearing of the jury, the request of the defendant for a hearing upon the statement which has been identified as
>
> "Mr. Riley: 16 and 16-1.

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"The Court: 16 and 16-1, it is the court's opinion that the matters concerning the statement should be offered in the presence of the jury, subject, of course, to any attacks as to its credibility by the defendant. The defendant has, of course, the right to proceed to challenge the voluntariness of the statement and confession, even before the jury, but it is the court's opinion that upon the evidence that has been offered before the court and outside of the hearing of the jury, that the statement is and should be admissible in evidence, subject to further examinations of the witnesses which might be conducted, so we may proceed with Sergeant Little, as to his identification before the jury of the statement in question, Exhibit 16 and 16-1.

"Mr. Henley: In other words, the court is overruling my motion, and request that the court to hold as a matter of law, that these statements were involuntary, is that right?

"The Court: That is right. Mr. Sheriff, will you bring the jury back in?"

Petitioner will submit that the trial court has quite clearly, and "with unmistakable clarity" determined the voluntariness of the confession pursuant to the standards in *Jackson* v. *Denno*. Apparently, the requirement of *Jackson* v. *Denno*, is that certain talismanic words must appear on the record before the procedure complies with the requirements of due process. In this regard, Judge Gibson of the Circuit Court below in dissent stated:

"The argument here appears to be more a matter of semantics or technicalities than a substantial procedural defect in trial proceedings. The trial court's decision in admitting the confession was based on conflicting evidence, the same evidence that is now urged to upset the verdict and judgment of the state court. No new evidence has been adduced and we are in effect now being asked to review this same evidence and hold the procedure bad because the judge did not

use the magic rubric 'voluntary' but said in effect, as is clearly shown by the record, that the confession was admissible and not involuntary as a matter of law. By refusing to hold that the confession and statements were involuntary, the court in the context of this hearing would be holding that the confession and statements were voluntary. This particular preliminary hearing on the confession and statements was not held just to see if there was conflicting evidence, as under the New York Rule held defective in *Jackson* v. *Denno*."

In light of the foregoing, petitioner would submit that the Eighth Circuit has incorrectly applied *Sims* v. *Georgia*, 385 U.S. 538, in that the record clearly indicates the Circuit Court of Butler County, Missouri, found defendant Stidham's confession voluntary.

Petitioner would also note the unusual circumstances by which respondent Stidham's appeal reached the Eighth Circuit after a successive filing of his petition for writ of habeas corpus in the United States District Court for the Western District of Missouri. By reference to Appendix G, Appendix H, and Appendix I, it can be seen that on June 25, 1970, the Eighth Circuit granted respondent Stidham's Motion to Dismiss his appeal. It can further be seen that on September 25th, petitioner filed a successive habeas corpus petition in the United States District Court for the Western District of Missouri, and simultaneous therewith filed a motion to reinstate his appeal in the Court of Appeals. The Court of Appeals denied his motion but the United States District Court for the Western District of Missouri entertained respondent's second petition and in reliance on its prior order denied issuance of the writ. It is this second denial of exact issues which respondent appealed to the Eighth Circuit. While petitioner recognizes that res judicata is not a general rule applied in habeas

corpus proceedings, petitioner would submit that what is exhibited on this record is an abuse of the habeas proceedings.

Petitioner concludes that an abuse of the habeas procedure is seen by the litigious nature of the respondent, and would particularly note the dismissal of this cause originally before the Eighth Circuit, and the subsequent second filing on the exact issue before the District Court. Respondent would conclude that pursuant to Title 28, Section 2244(b); *Salinger* v. *Loisel*, 265 U.S. 224; and *Smith* v. *Yeager*, 393 U.S. 122, that the Circuit Court below abused its discretion in allowing the docketing of petitioner's second appeal in this case. Quite candidly, petitioner would admit that this issue was not briefed to the Circuit Court below, but would contend that this issue goes to the jurisdiction of the Circuit Court below to hear this cause and therefore this court may enter judgment.

WHEREFORE, petitioner prays that a writ of *certiorari* be issued to the United States Court of Appeals for the Eighth Circuit, and that this case be reviewed by this court and that the judgment below should be reversed.

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